85-350

Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

***

JOHN WALRAVEN FARLEY, III, PETITIONER

V

LENA FARLEY ROBERTS, RESPONDENT.

***

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF TEXAS

David W. Anderson
P.O. Box 270
Marlin, Texas 76661
817-883-5529

QUESTIONS PRESENTED

In this case the Petitioner is in receipt of compensation from the Veterans' Administration and disability pay from the United States Air Force. Respondent has asserted a community property right in these benefits. As such the questions presented are as follows:

1. Does the community property right asserted by Respondent in payments received by Petitioner from the Veterans' Administration conflict with terms of the federal statutes governing Veterans' Benefits sufficiently to injure the objectives of the federal program, and, therefore, require nonrecognition?

2. Does the community property right asserted by Respondent in payments received by Petitioner because of military disability conflict with the terms of the federal statutes governing military disability sufficiently to injure the objectives of the federal program, and, therefore, require nonrecognition?

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TO SUPREME COURT OF TEXAS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Texas:

John Walraven Farley, III, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas denying Petitioner's Application for Writ of Error entered on April 10, 1985.

CITATION TO OPINIONS BELOW

The Supreme Court of Texas did not issue an opinion in this case. The judgment of the Supreme Court of Texas denying Petitioner's Application for Writ of Error appears in Appendix C to this petition at page 1. The Court of Appeals for the Sixth Supreme Judicial District of Texas issued an unreported opinion which appears in Appendix A to this petition, at page 1. A copy of the judgment of the Court of Appeals appears in Appendix C to this petition at page 3-4. A copy of the judgment of the 22nd District Court of Comal County, Texas, appears in Appendix C to this petition at page 5-7.

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT

The judgment of the Supreme Court of Texas denying Petitioner's Application for Writ of Error to that court was entered on April 10, 1985. A timely motion for rehearing was overruled on May 22, 1985. (Appendix C, infra, page 1). The jurisdiction of the Supreme Court is invoked under 28 USC §1257 (3).

CONSTITUTION AND STATUTE INVOLVED

This case involves Article VI. Clause 2. of the United States Constitution which reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves sections 101(13), 211, 315, 331, 334, 335, 3012, 3101 from Title 38 U.S.C. concerning Veterans' Benefits, and Sections 1201, 1210, 1408 from Title 10 U.S.C. concerning Armed Forces. The pertinent parts of these sections are reproduced in Appendix B.

STATEMENT OF THE CASE

On July 14, 1978, a decree of divorce was entered in Cause Number 272,919 in the 147 Judicial District Court of Travis County, Texas. (TR, page 9) By reference in the decree, the court approved and incorporated a community property agreement previously entered into by the parties. (SF, page 5)

In pertinent part the property settlement as executed on July 13, 1978 reads as follows:

> . . . It is therefore agreed that the wife shall own, possess and enjoy, free and clear from any claim of the husband, the property listed below:

. . .

> K. One-half of the monthly gross retirement pay received by husband as a result of his service with the United States Air Force, such retirement pay to be remitted to wife on a monthly basis, within 10 days of its receipt by husband; . . . (TR, pages 2-5)

On June 19, 1980, in Cause Number 272,919, in Travis County, Texas Respondent Roberts filed a Motion to Enforce Judgment, which was denied after a hearing before the divorce court.

Subsequently, on July 1, 1981, in Cause Number C-81-260 in the 22nd District Court of Comal County, Texas, Respondent Roberts filed suit seeking to reform the Property Settlement Agreement and to obtain a money judgment against Petitioner Farley. (TR, pages 2-5) Respondent asserted that the property settlement should be reformed because it "... contains a misdescription of the property sought to be divided." (TR, page 3)

The case was tried on September 23, 1981. (TR, page 18) On March 17, 1982, the Court entered an order reforming the Community Property Agreement and awarding Respondent Roberts a judgment against Petitioner Farley in the Principal amount of ten thousand five hundred and twenty-five dollars and ninety-seven cents ($10,525.97). (TR, pages 18-20)

The trial court found that Section K. should be reformed to read:

> In an amount equal to one-half of the gross amount of the monthly benefits or annuity payments received by husband, where husband became entitled to such monthly benefit or annuity payments pursuant to his service in the United States Air Force. The amount shall be paid to wife ... whether such payments received by husband represent retirement or disability retirement pay. (TR, page 20)

The trial court further made a specific finding that payments made to Petitioner by the Veterans' Administration "are to be included in calculation of the amount to be paid to wife pursuant to the property settlement agreement executed on July 13, 1978." (TR, page 20) Therefore, the benefits received by Mr. Farley are being characterized and treated as "property" which the wife shall own and possess subject to and controlled by normal contract principals.

In closing argument before the trial court Petitioner's attorney contended that Federal law prohibited division of the federal benefits

in question for community property purposes. The trial court was specifically referred to Ex Parte Johnson, 591 S.W. 2d 453 (Tex. 1979) and McCarty v. McCarty, 1981, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d. 589. (SF, pages 66-68) These contentions were presented in Petitioner's brief and oral argument before the Court of Appeals, Sixth District Texarkana, Texas. The Court of Appeals denied Petitioner relief in a two to one decision. The majority and dissenting opinions appear in Appendix A at pages 1 and 2 of this Petition. The majority opinion makes no direct reference to the federal benefits in question. The dissenting opinion noted that Petitioner contends veterans' benefits are not subject to division upon divorce and accepted the rationale expressed in McCarty, supra. These contentions were also presented to the Texas Supreme Court in Petitioner's Application for Writ of Error and in Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

1.

This case concerns the rights of disabled American Veterans to receive and keep benefits paid to them by federal government.

On entering the military, a citizen surrenders personal privacy, certain constitutional rights, and part of his or her individual freedom. And, leaving out all other considerations, the citizen must be prepared to give up his life instantly, on orders of a superior, or at perceived threat to the security of his unit. Veterans' benefits are one way the government recognizes that the citizen's duty to respond and serve carries with it an equal obligation on the governments part to provide for the well being of that defender.

To meet this obligation, Congress created a number of benefits for veterans, created a Veterans' Administration to determine who is entitled to the benefits, and created a mechanism to insure that the benefits actually reach the veteran. Statistical data indicates there are over 1.7 million veterans in the State of Texas, and approximately 1.375 million of them are married.[1] In FY 1983 Veteran's Administration expenditures in Texas were $1,629,664,137.00. Of this figure, $924,514,311.00 was utilized for Compensation and pension

[1]Source: State Profiles of the Veteran Population — Statistical Portraits from the 1980 Census, Published by Veterans' Administration Office of Information Management and Statistics.

benefits.[1] Coupled with similar information from other community property states, such statistics show that the outcome of this case will have far reaching ramifications for many, many veterans, and presents questions which should be decided by this court.

The principal question before the state courts was whether Respondent's claim based on the property settlement agreement incorporated in the divorce decree, was exempt from the strong language of the anti-attachment provision protecting veterans' benefits. As construed by the courts of Texas in this case, these benefits are governed by the basic principles of contract law allowing them to be treated as community property subject to the ordinary rules of property division upon divorce. Petitioner respectfully submits that this construction is in flat conflict with federal statutory law and with prior decisions of this court. A veterans' basic entitlement to disability compensation from the Veterans' Administration for service-connected disabilities resulting from personal injury or disease, in either wartime or peacetime is set forth in 38 U.S.C. Section 310 and Section 331. The term "compensation" as defined in Title 38 Section 101(13) means "a monthly payment made by the Administrator to a veteran because of service-connected disability." The basic rates of compensation depend upon the percentage of disability and whether it was incurred during wartime or peacetime. 38 U.S.C. Sections 314, 334.

It has been held that these benefits are gratuities and establish no vested rights in recipients. They may be withdrawn at any time and under any conditions Congress may choose. Milliken v. Gleason, C.A.R. I. 1964, 332 F 2d 122. Certiorari denied 85 S. Ct. 723, 379 U.S. 1002, 13 L. L. Ed. 2d 703; Steinmasel v. U.S., D. C. S. D. 1962, 202 F. Supp. 335. Therefore the veteran cannot acquire any property rights in the compensation paid to him. However, even as reformed, the judgment of the courts of Texas continue to declare that the wife shall own as her separate property one-half of the benefits received by the husband.

In addition, excepting certain questions related to veterans' insurance and to home, farm and business loans, Congress provided:

> (T)he decisions of the Administrator on any question of law or fact under any law administered by the Veterans'

[1]Source: Geographic Distribution of Veterans' Administration Expenditures — Fiscal Year 1983 — County and Congressional District.

> Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise. 38 U.S.C. 211

Under this section, there is no review allowed of the Administrator's decision. This court has held that Congress, in granting disability benefits to veterans, was within its rights in making decisions of the Administrator final, and in denying to beneficiaries any right to contest such decision in the courts. Klein v. Lee, 1959, 79 s. Ct. 536, 358 U.S. 645, 3 L. Ed. 568. Therefore, it is the sole responsibility of the Administrator, acting pursuant to congressional directives, to designate the individuals entitled to receive veterans' compensation.

Congress did provide a limited community concept in these benefits even though the spouse did not serve in the armed forces. A veteran can be entitled to an additional amount of compensation for a spouse, child and/or dependent parent where the veteran is entitled to compensation based on a disability evaluation. 38 U.S.C. 315, 335. However, upon divorce this amount of additional compensation is reduced on the last day of the month in which the divorce occurs. 38 U.S.C. 3012(b)(2); as amended Pub. L. 97-253, Title IV, §402(a), September 8, 1982, 96 Stat 802.

Therefore, as recently as 1982, Congress continued to make absolutely no provision for payments to a divorced spouse. In fact the 1982 amendment changed the reduction date from the end of the calendar year to the end of the month. Surely a rational argument cannot be made that Congress expected the disabled veteran to continue to provide for the family as he did prior to the divorce and then reduce the funds made available for him to do so.

However, in this case, the decision of the trial court and the appellate courts of Texas in effect substitutes the Respondent as the beneficiary for one-half the proceeds. This action clearly nullifies the decision of the Administrator, and ignores the deliberate action of Congress excluding the divorced spouse as a beneficiary.

The mechanism which protects the benefits and insures they reach the beneficiary named by the Administrator is 38 U.S.C. 3101, which deals with nonassignability and the exempt status of benefits. As to nonassignability, Section 3101 provides: "Payments of benefits . . .

shall not be assignable except to the extent specifically authorized by law." The word "assign" has been defined as meaning "to make over or set over to another." North Texas National Bank v. Thompson 23 S.W. 2d 494, 499. The word "assignment" as defined in Black's Law Dictionary means:

> A transfer or making over to another of the whole of any property real or personal, in possession or in action or of any estate or right therein.

But, by the money judgment entered and the reformation granted, the courts of Texas have held a portion of these benefits can be set over or assigned to someone other than the disabled veteran.

Concerning the exempt status of benefits, Section 3101 provides that:

> Such payments made to, or on account of, a beneficiary shall be exempt from the claim of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process, whatever, either before or after receipt by the beneficiary.

The exemption provision of Section 3101 as pertaining to this case has remained virtually unchanged since 1935.

The provisions of the statutory predecessor of Section 3101 were interpreted by this court in Wissner v. Wissner, 1950, 338 U.S. 655, 70 S. Ct. 619 to preclude a division for community property purposes. In Wissner, this court distinguished those cases dealing with community property divisions from cases which held that payments received as pension, disability insurance, or veterans' compensation are not exempted from claims for alimony or family support by exemption statutes in the pattern of Section 3101. This court noted that the California judgment was deficient because it worked to "seize" the payments received under the policy which "... is in flat conflict with the exemption provision ..." The court further held:

> whether directed at the very money received from Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. IT CANNOT STAND

Therefore, in Wissner, this court has already spoken concerning the exempt status of veterans' benefits from community property

claims, and in so doing, state courts have been denied the power or jurisdiction to make community property divisions of veterans' benefits.

Nonetheless, the Respondent takes the position that the above statutory and case law does not apply because in this case there is a Property Settlement Agreement whereby the veteran by contract agreed to set his benefits over to another person.

However, in 1949, the California Supreme Court was faced with a case involving a property settlement agreement. Kaufman v. Kaufman, 1949 210 P.2d 29, 93 Cal. App. 2d 808. In part, the agreement read as follows:

> It is agreed between the parties hereto that Husband has caused to be issued in his name a $5,000.00 U.S. War Risk Insurance Policy . . . It is understood and agreed that so long as said policy remains in full force and effect, the Wife shall be named as beneficiary under said policy; provided however, that if a final decree of divorce should be granted to either party hereto then and in that event (wife) . . . and . . . the children of the parties hereto, shall be named as beneficiary of said policy.

Subsequently there was a divorce between the couple. The beneficiaries were initially changed according to the agreement. However, the husband eventually remarried and named his second wife as the sole beneficiary of the policy. After his death, the government began making payments under the policy to the second wife.

Suit was filed contesting this and seeking to enforce the property settlement agreement. The California court concluded that the property settlement agreement was an assignment of the proceeds of the policy and that such assignment was prohibited by Federal law.

On several occasions federal courts have dealt with the effect of an agreement concerning veterans' insurance benefits. In 1931, a widow and family of a deceased veteran contested the proceeds of the veterans' life insurance policy. Robertson v. McSpadden, D.C. Ark. 1931, 46 F2d 702. During the case, an agreement to settle the claims was reached and a consent decree was entered. However, the appeals court held that this agreement, if carried out, would defeat the purpose and intent of the Federal statute. Robertson v. McSpadden, supra.

In 1944, the validity of an agreement to compromise the payments

being made under an insurance policy was presented. Bradley v. U.S., C.C.A. Okl (1944) 143 F.2d 573, certiorari denied 65 S. Ct. 429, 323 U.S. 793; 89 L. Ed. 632. The court held that an agreement to divide the proceeds of policy would be an assignment and "that such assignment is specifically prohibited ..."

In 1962 the Sixth Circuit was presented the question of "...whether an insured veteran ... can effectively contract away his right to change the beneficiary of his policy." Kimball vs. U.S., C.A.. Ohio 1962, 304 F2d 864. That court held that the veteran could not effectively contract away rights granted under Title 38.

These cases clearly show that under long-standing statutory and case law, individuals cannot alter the nature or characteristics of veterans' benefits by agreement. This court has also recently dealt with the enforceability of such a property settlement agreement. In Ridgway v. Ridgway (1981), 454 U.S. 46, 102 S. Ct. 49, 70 L. Ed. 2d. 39, the court was concerned with a benefit issued pursuant to the Servicemen's Group Life Insurance Act of 1965, Pub. L. 89-214, 79 Stat. 880. In Ridgway, the state divorce judgment followed property settlement negotiations about which this court stated:

> We find nothing to indicate that Congress intended to exempt claims based on property settlement agreements from the strong language of the anti-attachment provision.

In footnote eleven following this statement the court said:

> We see no significant difference between the community property interest at issue in Wissner and the property settlement giving rise to the instant action.

Petitioner respectfully suggests that the Texas courts have decided an important question related to federal benefits in a manner contrary to prior rulings of this court. The Federal government surely would not give the power to alter these benefits to individuals while refusing the state courts any power or jurisdiction over them. To allow private agreements to determine that these benefits are "property," and that someone other than the named beneficiary is actually entitled to them, would mean the legislative policy of the government could be entirely subverted or destroyed by an agreement or series of agreements. Thus, it is the Petitioner's position that the community property right asserted by Respondent to a portion of these funds

conflicts with the express terms of federal law.

Petitioner also contends that the objectives of the federal program are sufficiently injured so as to require nonrecognition. Congress has the power to create and maintain military forces and pursuant to this grant of authority, Congress has enacted a military disability system to provide for the needs of military personnel who become disabled while serving their country. Obviously, knowing that the country will provide for his basic needs in the event of disability might well directly enhance the morale of servicemen. Throughout the spring and summer of 1985, we have seen constant reminders of the cost of military service to our Vietnam era veterans. Ten to fifteen years after their service many Vietnam veterans are still dealing with mental and physical problems related to their service.

In some cases the plight of the ex-spouse can be a serious one. However, in many cases the plight of the disabled serviceman can be just as serious. Certainly, the recent budget problems emphasize that Congress is dealing with finite funds. In this situation, it is even more clear that the decision of Congress as to who should receive those funds available must be honored.

Therefore, Petitioner contends the federal scheme of veterans' benefits pre-empts state community property laws which under the Supremacy Clause, U.S. Constitution, Article VI, Clause 2, precludes the trial court from awarding Respondent a portion of these benefits.

2.

The trial court's order also states Petitioner shall pay one-half the monthly benefits or annuity payment he receives "pursuant to his service in the United States Air Force . . . whether such payments received by husband represent retirement or disability retirement pay or disability benefits."

The Petitioner is in receipt of disability compensation under 10 U.S.C. Chapter 61. Petitioner is not entitled to longevity compensation; rather Petitioner was retired under the provisions of 10 U.S.C. §1201 and §1210.

The question thus presented is whether federal law precludes a state court from dividing military disability pay pursuant to state community property laws upon dissolution of the marriage. Certainly the net result of this case as it now stands is that Texas courts can divide these benefits.

This court dealt with nondisability military retirement in McCarty

v. McCarty, supra. The court quoted and relied upon its 1950 decision in Wissner in holding that Federal law concerning military retirement benefits precludes state courts from dividing military retired pay pursuant to state community property laws. While not directly faced with the question of disability retirement in McCarty, there is nothing in the court's analysis which would indicate that it would have held differently concerning disability retirement.

Subsequent to McCarty, Congress enacted the Uniformed Services Former Spouses Protection Act (Pub. L. No. 97-252) authorizing state courts to divide "disposable" retired or retainer pay upon divorce. The criticial question for this case becomes whether this act also authorizes state courts to divide disability retirement pay received pursuant to Chapter 61.

In part the legislative history to the act states:

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the McCarty decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent state or other laws in determining whether military retired or retainer pay should be divisible. . . .S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), reprinted in 1982 U.S. Code Cong. and Ad. News 1596, 1611.

This legislative history seems to clearly state that the act only applies, "with respect to treatment of nondisability military retired or retainer pay."

The act itself provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay . . . , either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 10 U.S.C. §1408(c)(1).

Clearly without this provision, the McCarty decision would still be controlling on the matter of nondisability retirement pay. However, a plain reading of §1408 shows that Congress did not give the states an unlimited right to treat military retirement pay in accordance with

general community property law, but rather made it clear that the grant was subject to the limitations imposed by §1408.

One of the limitations on the grant comes in the form of the definition of disposable retired or retainer pay which states:

> (4) Disposable retired or retainer pay means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title less amounts which:
>
> (A) ...
>
> (B) are required by law to be and are deducted from the retired or retainer pay of such member, including ..., and amounts waived in order to receive compensation under title 5 or title 38. 10 U.S.C. 1408(a)(4)

By this definition Congress specifically excluded from state consideration both types of pay received by Petitioner. It is Petitioner's position that the state court award clearly conflicts with the federal statutes in question.

For the reasons stated by this court in Wissner, supra. and McCarty, supra., Petitioner would also contend that the consequences of this conflict sufficiently injure the objectives of the federal program so as to require nonrecognition. In addition, as noted by this court in McCarty, federal disability pensions have been provided since the Revolutionary War. Necessarily then these benefits have to be among the oldest continuously provided federal programs. The very length of their existence demonstrates their peculiar importance to the federal government. Obviously from our very beginning Congress has recognized that care for veterans disabled in the nation's military service is of the highest national concern and that failure to so care could gravely affect the morale of our military forces.

Therefore the decision as to the treatment of the federal benefits for disabled veterans should be for Congress alone. In Section 1408, Congress has clearly and straight forwardly excluded military disability pay from treatment by state courts.

As such, Petitioner contends that the federal scheme of military disability benefits pre-empts state community property laws; therefore, the Supremacy Clause, U.S. Const., Art. VI, C1. 2, precludes the

trial court from awarding Respondent a portion of these benefits.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANDERSON & JOHNSON
Attorneys at Law
P.O. Box 270
Marlin, Texas 76661

By: _____
DAVID W. ANDERSON
State Bar No. 01174300

Attorney for Petitioner

APPENDIX A

Court of Appeals
Sixth District
Texarkana, Texas

John Walraven Farley, III--------Appellant	)	Appealed from the 22nd
No. 9188 v.	)	Judicial District Court
Lena Farley Roberts----------Appellee	)	of Comal County, Texas

---

John Walraven Farley, III appeals from a Comal County trial court judgment construing and enforcing the parties' contractual property settlement agreement incorporated into their July 14, 1978, divorce decree which was granted in Travis County. He contends the trial court did not have jurisdiction to render the judgment. We affirm the trial court's judgment.

A property settlement agreement is a contract and is governed according to basic principles of contract law. Day v. Day, 603 S.W. 2d 213 (Tex. 1980); Deen v. Deen, 631 S.W. 2d 215 (Tex. App. Amarillo 1982, no writ); Underhill v. Underhill, 614 S.W. 2d 178 (Tex. Civ. App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.); Mikeska v. Mikeska, 584 S.W. 2d 565 (Tex. Civ. App.-Houston [14th Dist.] 1979, no writ). A property settlement agreement does not lose its status as a contract because it is incorporated into the divorce decree. McCray v. McCray, 584 S.W. 2d 279 (Tex. 1979). An action for enforcement of such an agreement is not a proceeding under the Texas Family Code. The trial court had jurisdiction to interpret and enforce the parties' agreement. Day v. Day, supra; Deen v. Deen, supra; Underhill v. Underhill, supra; Carson v. Korus, 575 S.W. 2d 326 (Tex. Civ. App.-San Antonio 1978, no writ); Adwan v. Adwan, 538 S.W. 2d 192 (Tex. Civ. App.-Dallas 1976, no writ).

We affirm the trial court's judgment.

Bun L. Hutchinson
Associate Justice

December 28, 1984
Filed December 28, 1984

(Not to be Published — Rule 452, Tex. R. Civ. P.)

APPENDIX A

No. 9188

DISSENT

John Farley contends that the trial court did not have jurisdiction to reform the property settlement agreement which was incorporated into the divorce decree between the parties entered in 1978. He relies on Ex parte Johnson, 591 S.W. 2d 453 (Tex. 1979) for the proposition that Veterans Administration benefits are not subject to division upon divorce as property and the rationale expressed in McCarty v. McCarty, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981). I would hold that the trial court fundamentally erred in allowing Lena Farley Roberts to prevail on her collateral attack on a final and valid judgment.

In July of 1978, the 147th Judicial District Court of Travis County, entered a valid and final judgment granting a divorce to the parties and incorporated therein the parties' property settlement agreement. Later, in June, 1980, Lena Farley Roberts sought to enforce terms of the decree of the divorce. After failing, she filed this case in the 22nd District Court of Comal County. This appeal is by John Farley from the unfavorable judgment in the 22nd District Court.

The divorce decree is the final disposition of all matters between the parties concerning their properties. The judgment should be accorded the same degree of finality and be final and binding. McCray v. McCray, 584 S.W.2d 279 (Tex. 1979). This final judgment was res judicata and therefore should bar any attempt to relitigate the divorce property division and subsequent suit. Day v. Day, 603 S.W.2d 213 (Tex. 1980).

I would hold that the triaL court lacked jurisdiction to grant the judgment and reverse, rendering judgment that Lena Farley Roberts take nothing by her suit.

Charles Bleil
Associate Justice

December 28, 1984
Filed December 28, 1984

(Not to be Published — Rule 452, Tex. R. Civ. P.)

APPENDIX B — TITLE 38 VETERANS BENEFITS

PART 1 GENERAL PROVISIONS

CHAPTER 1 GENERAL

§101 Definitions

(13) The term ''compensation'' means a monthly payment made by the Administrator to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957.

CHAPTER 3 — VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

SUBCHAPTER II — ADMINISTRATION OF VETERANS' AFFAIRS

§211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the administration of the Veterans' Administration.

As amended Publ. L. 89-214, §1(b), Sept. 29, 1965, 79 Stat. 886; Pub. L. 89-358; §4(h), Mar. 3, 1966, 80 Stat. 24; Pub. L. 91-376, §8(a), Aug. 12, 1970, 84 Stat. 790.

APPENDIX B — TITLE 38 VETERANS BENEFITS

PART II — GENERAL BENEFITS

CHAPTER 11 — COMPENSATION FOR SERVICE CONNECTED DISABILITY OR DEATH

SUBCHAPTER II — WARTIME DISABILITY COMPENSATION

§315. Additional Compensation for Dependents

Any veteran entitled to compensation at the rates provided in section 314 of this title, and whose disability is rated not less than 30 percent shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and —

(A) has a spouse but no child, $79;

(B) has a spouse and one or more children, $132 plus $42 for each child in excess of one;

(C) has no spouse but one or more children, $54 plus $42 for each child in excess of one;

(D) has a parent dependent upon such veteran for support, then, in addition to the above amounts, $64 for each parent so dependent;

(E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person, shall be $143 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $120 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent in an amount having the same ratio to the amount specified

in paragraph (1) of this section as the degree of disability bears to total disability. The amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

(As amended Pub.L. 96-128, Title I, §102, Nov. 28, 1979, 93 Stat. 983; Pub.L. 96-385, Title I, §102, Oct. 7, 1980, 94 Stat. 1529; Pub.L. 97-66, Title I, §102, Oct. 17, 1981, 95 Stat. 1027; Pub.L. 97-253, Title IV, §§404(b), 405(c), Sept. 8, 1982, 96 Stat. 803, 804; Pub.L. 97-306, Title I, §§102, 107, Oct. 14, 1982, 96 Stat. 1430, 1431; Pub.L. 98-223, Title I, §102, Mar. 2, 1984, 98 Stat. 38; Pub.L. 98-543, Title I, §102, Oct. 24, 1984, 98 Stat. 2736.)

SUB CHAPTER IV — PEACETIME DISABILITY COMPENSATION

§331. Basic Entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122.

§334. Rates of peacetime disability compensation

For the purposes of section 331 of this title, the compensation payable for the disability shall be that specified in section 314 of this title.

Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1123; Pub.L. 92-328, Title I, §108(a), June 30, 1972, 86 Stat. 396.

SUBCHAPTER IV —
PEACETIME DISABILITY COMPENSATION

§335. Additional Compensation for Dependents

Any veteran entitled to compensation at the rates provided in section 334 of this title, and whose disability is rated not less than 30 percent, shall be entitled to additional monthly compensation for dependents as provided in section 315 of this title.

(As amended Pub. L. 98-543, Title I, §112(a), Oct. 24, 1984, 98 Stat. 2740.)

1984 Amendment. Pub. L. 98-543 substituted "30 percent" for "50 percent".

Effective Date of 1984 Amendment. Section 112 of Pub. L. 98-543 provided that: "The amendment made by subsection (a) [amending this section] shall take effect as of Oct. 1, 1978.

Legislative History. For legislative history and purpose of Pub. L. 98-543, see 1984 U.S. Code Cong. and Adm. News, p. 4479.

APPENDIX B — TITLE 38 VETERANS BENEFITS

PART IV — GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER 51 — APPLICATIONS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER II — EFFECTIVE DATES

§3012 Effective dates of reductions and discontinuances.

(a) Except as otherwise specified in this section, the effective date of reduction or discontinuance of compensation, dependency and indemnity compensation, or pension shall be fixed in accordance with the facts found.

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension.

(2) By reason of marriage, annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs.

(as amended Pub. L. 97-253, Title IV, §402(a), September 8, 1982, 96 Stat. 802.)

Leg Hist 1982 U.S. Code Cong & Adm News P 1641 C.F.R. 3.500

APPENDIX B — TITLE 38 VETERANS BENEFITS

PART IV — GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER 53. — SPECIAL PROVISIONS RELATING TO BENEFITS

§3101. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the adress of an attorney-in-fact as the payee's address for the purpose of receiving his or her benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

As amended Pub.L. 94-502, Title VII, §701, Oct. 15, 1976, 90 Stat. 2405.

APPENDIX B — TITLE 10 ARMED FORCES

SUBTITLE A — GENERAL MILITARY LAW

PART II — PERSONNEL

CHAPTER 61 — RETIREMENT OR SEPARATION FOR PHYSICAL DISABILITY

§1201. Regulars and members on active duty for more than 30 days: retirement

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also determines that —

(1) based upon accepted medical principles, the disability is of a permanent nature;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either—

(A) The member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and either—

(i) the member has at least eight years of service computed under section 1208 of this title;

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after

September 14, 1978.

(Aug. 10, 1956, c. 1041, 70A Stat. 91; Sept. 2, 1958, Pub.L. 85-861, §1(28)(A), 72 Stat. 1451; Sept. 7, 1962, Pub.L. 87-651, Title I, §107(a), 76 Stat. 508; Sept. 19, 1978, Pub.L. 95-377, §3(1), 92 Stat. 719; Sept. 8, 1980, Pub.L. 96-343, §10(c)(1), 94 Stat. 1129; Dec. 12, 1980, Pub.L. 96-513, Title I, §117, 94 Stat. 2878.)

CHAPTER 61 RETIREMENT — PHYSICAL DISABILITY

§1210. Members on temporary disability retired list: periodic physical examination; final determination of status

(a) A physical examination shall be given at least once every 18 months to each member of the armed forces whose name is on the temporary disability retired list to determine whether there has been a change in the disability for which he was temporarily retired. He may be required to submit to those examinations while his name is carried on that list. If a member fails to report for an examination under this subsection, after receipt of proper notification, his disability retired pay may be terminated. However, payments to him shall be resumed if there was just cause for his failure to report. If payments are so resumed, they may be made retroactive for not more than one year.

(b) The Secretary concerned shall make a final determination of the case of each member whose name is on the temporary disability retired list upon the expiration of five years after the date when the member's name was placed on that list. If, at the time of that determination, the physical disability for which the member's name was carried on the temporary disability retired list still exists, it shall be considered to be of a permanent nature.

(c) If, as a result of a periodic examination under subsection (a), or upon a final determination under subsection (b), it is determined that the member's physical disability is of a permanent nature and is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, his name shall be removed from the temporary disabili-

ty retired list and he shall be retired under section 1201 or 1204 of this title, whichever applies.

(d) If, as a result of a periodic examination under subsection (a), or upon a final determination under subsection (b), it is determined that the member's physical disability is of a permanent nature and is less than 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of determination, and if he has at least 20 years of service computed under section 1208 of this title, his name shall be removed from the temporary disability retired list and he shall be retired under section 1201 or 1204 of this title, whichever applies, with retired pay computed under section 1401 of this title.

(e) If, as a result of a periodic examination under subsection (a), or upon a final determination under subsection (b), it is determined that the member's physical disability is less than 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, and if he has less than 20 years of service computed under section 1208 of this title, his name shall be removed from the temporary disability retired list and he may be separated under section 1203 or 1206 of this title, whichever applies.

(f) If, as a result of a periodic examination under subsection (a), or upon a final determination under subsection (b), it is determined that the member is physically fit to perform the duties of his office, grade, rank, and rating, the Secretary shall treat him as provided in section 1211 of this title.

(g) Any member of the armed forces whose name is on the temporary disability retired list, and who is required to travel to submit to a physical examination under subsection (a), is entitled to the travel and transportation allowances authorized for members in his retired grade traveling in connection with temporary duty while on active duty.

(h) If his name is not sooner removed, the disability retired pay of a member whose name is on the temporary disability retired list terminates upon the expiration of five years after the date when his name was placed on that list.

(Aug. 10, 1956, c. 1041, 70A Stat. 95.)

APPENDIX B — TITLE 10 ARMED FORCES

SUBTITLE A — GENERAL MILITARY LAW

PART II — PERSONNEL

CHAPTER 71 — COMPUTATION OF RETIRED PAY

§1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) 'Court' means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Birgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands'

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court:

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owned by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or returied by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled:

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) 'Member' includes a former member.

(6) 'Spouse or former spouse' means the husband or wife, or

former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations, prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Nothwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his

residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of

a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) our of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the vent of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall—

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting

court order, but not more than the amount of disposable retired, or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social SEcurity Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with

such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during wuch month after the satisfaction of all court orders or legal process which have been previously served.

(B) Nothwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 549 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social SEcurity Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have

been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"1408. Payment of retired or retainer pay in compliance with court orders.".

(As amended Pub.L. 98-525, Title VI, §643(a)-(d), Oct. 19, 1984, 98 Stat. 2547, 2548.)

APPENDIX C

IN THE SUPREME COURT OF TEXAS

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No. C-3961 April 10, 1985

JOHN WALRAVEN FARLEY, III) From Comal County,
)
vs.) Sixth District
)
LENA FARLEY ROBERTS)

Application of petitioner for writ of error to the Court of Apeals for the Sixth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, John Walraven Farley, III, pay all costs incurred on this application

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No. C-3961 May 22, 1985

JOHN WALRAVEN FARLEY, III) From Comal County,
)
vs.) Sixth District
)
LENA FARLEY ROBERTS)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overrulled.

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I MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the

minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 22nd day of May, 1985.

MARY M. WAKEFIELD, Clerk
By _____, Deputy
Courtland Crocker

APPENDIX C

JUDGMENT

BE IT REMEMBERED that on Friday, the 28th day of December, A.D. 1984, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Ben L. Hutchinson, Associate Justice, Charles Bleil, Associate Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

John Walraven Farley, III - Appellant	)	Appealed from the 22nd
No. 9188 v.	)	Judicial District Court
Lena Farley Roberts----------Appellee	)	of Comal County, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of the parties; and the Court, after considering the same, is of the opinion and finds there was no error requiring reversal in the judgment of the court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court of March 17, 1982, be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellant John Walraven Farley, III, shall pay all costs expended in behalf of this appeal, whether in this Court or in the court below, for which let execution issue; and the Court, noting that appellant has deposited cash in to the Registry of the court below in lieu of appeal bond, hereby directs the Clerk of the court below to pay out of such deposit all costs of this appeal; and that this judgment be certified to the court below for observance.

APPENDIX C

BE IT REMEMBERED that on Tuesday the 22nd day of January A.D. 1985 the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana, Texas. Present William J. Cornelius, Chief Justice, Bun L. Hutchinson, Associate Justice, Charles Bleil, Associate Justice, and Louise Waldrop Lohse, Clerk.

When the following proceedings, among others, were had to-wit:

John Walraven Farley, III — Appealed from District Court
No. 84-013:9188 v. — of Comal County.
Lena Farley Roberts

This cause came on to be heard on Appellant's Motion for Rehearing and the Court having inspected and duly considered said motion is of the opinion that the said motion should be and the same is hereby OVERRULED.

THE STATE OF TEXAS
COUNTY OF BOWIE

I, LOUISE WALDROP LOHSE, Clerk of the Court of Appeals for the Sixth Supreme Judicial District of Texas, do hereby certify that the above and foregoing contains a true and correct copy of all orders on Motions for Rehearing and Judgments rendered by said Court in Cause No. 9188, styled John Walraven Farley, III v. Lena Farley Roberts as the same appear of record in the Minutes of this Court.

IN TESTIMONY WHEREOF, witness my hand and official seal of office in the City of Texarkana, Texas, this the 8th day of March A.D., 1985.

Louise Waldrop Lohse, Clerk of
the Court of Appeals for the
Sixth Supreme Judicial District
of Texas at Texarkana

Lynda Poore,
Deputy Clerk

APPENDIX C

NO. C-81-260

Lena Farley Roberts	)	In the 22nd Judicial
	)	
VS	)	District Court of
	)	
John Walraven Farley, III	)	Comal County, TX

ORDER

On the 23rd day of September, 1981, came on to be heard the Petition of Lena Farley Roberts, Plaintiff, for reformation of a "Property Settlement Agreement" executed by Plaintiff, Lena Farley Roberts, and Defendant, John Walravewn Farley, III, on July 13, 1978, and presented to the 147th District Court, Travis County, Texas on July 14, 1978 in cause number 272,919.

The Court finds that the Defendant is a resident of Comal County, Texas, and that venue is properly before this Court and that this Court has jurisdiction over the property settlement agreement, the subject matter of this suit.

Plaintiff appeared in person and by attorney and announced ready for trial. Defendant appeared in person and by attorney and announced ready for trial.

No jury was demanded and all matters in controversy, including questions of fact and law, were submitted to the Court. All persons entitled to citation were properly cited.

The Court finds that Plaintiff and Defendant entered into a "Property Settlement Agreement" on July 13, 1978, in which Defendant agreed to pay to Plaintiff "one half of the monthly gross retirement pay received by husband (Defendant herein) as a result of his service with the United States Air Force, such retirement pay to be remitted to wife on a monthly basis, within ten (10) days of its receipt by husband."

The Court finds that upon the terms of the property settlement agreement, Defendant was to pay to Petitioner an amount of money each month. Payment of the money was contingent on Defendant's receipt of a sum from the United States Government pursuant to Defendant's service as a member of the United States Air Force during the existence of the marriage between the Plaintiff and Defendant.

The amount of money to be paid to Plaintiff was to be an amount equal to one-half of the gross monthly benefit or annuity payments regularly received by the Defendant.

The Court finds further that a mutual mistake was made and the amount upon which the monthly payment to the Plaintiff was to be calculated was incorrectly characterized in the property settlement agreement and that the property settlement agreement should read "in an amount equal to one-half of the gross amount of the monthly benefits or annuity payments received by husband, where husband became entitled to such monthly benefit or annuity payments pursuant to his service in the United States Air Force. The amount shall be paid to wife on a monthly basis, within ten (10) days of receipt of the monthly benefits or annuity by husband, at her home or office or mailing address in Travis County, Texas, whether such payments received by husband represent retirement or disability retirement pay."

The Court finds that Defendant may elect to receive a portion of his annuity or benefits through programs administered by the Veterans' Administration and that Defendant's Air Force disability retirement annuity benefit will be reduced by an amount equal to his Veterans' Administration monthly benefit. The Court finds further that benefits paid to Defendant pursuant to the Veteran's Administration program are paid to Defendant as a result of his service with the United States Air Force and that the amount of such benefits are to be included in calculation of the amount to be paid to wife (Plaintiff herein) pursuant to the property settlement agreement executed on July 13, 1978.

The Court finds further that the amounts payable by husband to wife under the Section K total ten thousand five hundred and twenty-five dollars and ninety-seven cents ($10,525.97) for the months of March 1980 through December 1981, inclusive.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Section K of the property settlement agreement executed July 13, 1978, in cause number 272,919 before the 147th District Court of Travis County, Texas shall be reformed and hereafter shall read as follows: "in an amount equal to one-half of the gross amount of the monthly benefits or annuity payment received by husband, where husband became entitled to such monthly benefit or an-

nuity payments pursuant to his service in the United States Air Force. The amount shall be paid to wife on a monthly basis, within ten (10) days of receipt of the monthly benefits or annuity by husband, at her home or office or mailing address in Travis County, Texas, whether such payments received by husband represent retirement or disability retirement pay or disability benefits."

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that amounts received by Defendant on a monthly basis through a program administered by the Veterans' Administration shall be included in calculation of the amount to be paid to Plaintiff pursuant to Section K of the Property Settlement agreement executed by Defendant and Plaintiff on July 13, 1978.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff LENA FARLEY ROBERTS have judgment against Defendant JOHN WALRAVEN FARLEY, III, in the amount of ten thousand five hundred and twenty five dollars and ninety-seven cents ($10,525.97) with interest from the date of this decree.

IT IS SO ORDERED.

SIGNED AND ENTERED THIS 17th day of March, 1982.

Charles Ramsey,
Judge Presiding

APPROVED AS TO FORM:

Anthoney Tomblin,
Attorney for Defendant

John Barrett,
Attorney for Plaintiff

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No. 85-350

In The

Supreme Court of the United States

October Term, 1985

JOHN WALRAVEN FARLEY, III,

Petitioner,

vs.

LENA FARLEY ROBERTS,

Respondent.

BRIEF IN OPPOSITION TO FARLEY'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JOHN BARRETT
State Bar No. 01816300
805 West 10th Street, Suite 300
Austin, Texas 78701
(512) 482-8193

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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RESPONDENT'S COUNTERPOINT

1. Can a person who receives either Air Force disability retirement or Veterans' Administration disability compensation enter into any binding contract that obligates him to pay money?

LIST OF INTERESTED PARTIES

1. John Walraven Farley, III, Petitioner.
2. Lena Farley Roberts, Respondent.

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

The Petitioner's petition correctly states: the official and unofficial Opinions in the Texas Courts.

STATEMENT OF JURISDICTION

The Petitioner's petition correctly states the action of the Supreme Court of Texas. Respondent contests the jurisdiction of this Honorable Court under 28 U.S.C. 1257, for the validity of no statute or treaty of the United States has been drawn into question by the actions of the Texas courts in connection with this case.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

The Petitioner's petition correctly reflects the constitutional provisions and statutes upon which he relies.

———o———

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct in stating the nature of the case with the following corrections or modifications:

1. The settlement agreement referred to is properly styled "Property Settlement Agreement," not "Community Property Agreement."

———o———

SUMMARY OF ARGUMENT

(A) The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not characterize Petitioner's Air Force disability retirement as community property in violation of 10 U.S.C. §1408.

(B) The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not characterize Petitioner's Veterans' Administration disability retirement as community property and its action did not result in an assignment of this retirement or an "attachment, levy, or seizure" of it in violation of 38 U.S.C. §1301.

ARGUMENT

A. A Veteran May Contract To Make Payments To Former Spouse The Amount Of Which Is Based In Part On The Amount Of Air Force Disability Retirement Received.

Restatement of A

The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not characterize Petitioner's Veterans' Administration disability compensation as community property in violation of 10 U.S.C. §1408.

Argument Under A

This is a simple suit for reformation of a contract and damages for the breach thereof. Respondent has not asserted a community property right to Petitioner's Air Force disability retirement payments and Petitioner's Veterans' Administration disability retirement payments. The trial court did not divide these payments as community

property. Further, an action for the enforcement of a contract such as the one entered into by Petitioner and Respondent is not even a proceeding under the Texas Family Code, which governs community property division upon divorce. *Underhill v. Underhill*, 614 S.W.2d 178 (Tex. Civ. App.-Houston 1981) n.r.e.

Petitioner receives payments from two different sources. First, he receives Air Force disability retirement. Second, he receives Veterans' Administration disability retirement. Since these forms of retirement pay are treated differently by the case law and statutes, they will be dealt with separately, beginning first with the Air Force disability retirement.

McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728 (1981) held that military nondisability retirement is not divisible in state court divorce proceedings. It is true, as Petitioner points out, that there is nothing in the court's analysis that would indicate that it would have held differently concerning military disability retirement. But *McCarty* does not address the question of whether or not a veteran can by contract agree to make payments to his former spouse when the amount of those payments is based upon the amount of money received by the veteran each month. And *McCarty* certainly does not limit the ability of a court in a state that does allow alimony to order a veteran receiving such retirement to make alimony payments even if the retirement were his only source of income, and the contract issue here is essentially a private contract providing for alimony.

Petitioner points out that subsequent to *McCarty* Congress enacted the Uniformed Services Former Spouses

Protection Act (Pub. L. No. 97-252) authorizing state courts to divide "disposable" retired or retainer pay upon divorce and that the legislative history seems to state that the act only applies with respect to the treatment of non-disability military retired pay or retainer pay. Petitioner further correctly notes that a reading of the act itself discloses that Congress has excluded military disability pay from division by state courts.

But this argument is beside the point. As noted with regard to *McCarty*, it happens that in this case the Texas state courts did not divide the disability payments and so this act does not apply. Petitioner simply agreed to pay Respondent a sum of money each month equal to one-half of his military retirement pay. At the time the agreement was entered into the only military retirement Petitioner was receiving was his Air Force disability retirement, which he is again receiving. Nothing in *McCarty* or the Uniformed Services Former Spouses Protection Act would have prevented him from so doing.

In sum, it is clear that that portion of the judgment which is based upon Air Force disability retirement is valid.

B. A Veteran May Contract To Make Payments To Former Spouse The Amount Of Which Is Based In Part On The Amount Of Veterans' Administration Disability Retirement Received.

Restatement of B

The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not

characterize Petitioner's Veterans' Administration disability retirement as community property and its action did not result in an assignment of this retirement or an "attachment, levy, or seizure" of it in violation of 38 U.S.C. § 1301.

Argument Under B

Petitioner, during a portion of the period which was the subject of this suit, was drawing Veterans' Administration disability retirement. V.A. retirement is the product of a different scheme and is the subject of a different case law than military retirement. Petitioner cites *Wissner v. Wissner,* 339 U.S. 926, 70 S.Ct. 619 (1950) to the effect that, because of 38 U.S.C. § 3101, which forbids the assignment of V.A. compensation and exempts it from "attachment, levy, or seizure," states courts have been denied the power or jurisdiction to make community property divisions of veterans' benefits. However, as already noted, the Texas state courts did not make any community property division of Petitioner's V.A. compensation.

Recognizing this, Petitioner then cites several cases that supposedly show that one may not by a Property Settlement Agreement contract to make payments dependent upon one's V.A. compensation. But the cases are not in point. They all involve disputes as to the assignment of the beneficiary of veterans' insurance policies, that is, as to whether payment is to be made directly to one person as beneficiary or to another. No such assignment was agreed to in this case. Petitioner's V.A. retirement payments are to continue to be made directly to him. He is simply to pay Respondent an amount that makes allowance for this V.A. compensation income. If followed to its log-

ical conclusion, the reasoning adopted by Petitioner would lead to the position that a person drawing V.A. compensation could not enter into any binding agreement to pay money because the money paid might come from his V.A. compensation. Such is surely not the law. One may contract to pay money without effecting an assignment or an "attachment, levy, or seizure." There is nothing in any of the cases cited by Petitioner to indicate that in a state which allows alimony there is any prohibition of a court ordering alimony to be paid by a person receiving such compensation even if it is the only income that he receives.

In sum, in the present case the V.A. compensation exempt statutes are not compromised in any way, nor has the V.A. compensation been divided by the Court as community property. The Court has simply enforced a contract and given a judgment for damages for the breach of that contract.

CONCLUSION

Respondent respectfully prays that Petitioner's Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

JOHN BARRETT
State Bar No. 01816300
805 West 10th Street, Suite 300
Austin, Texas 78701
(512) 482-8193

Attorney for Respondent